

DATE: October 8, 2002

TO: ALL STATE AGENCY PERSONNEL OFFICERS

SUBJECT: ILLEGAL APPOINTMENTS

Article VII of the State Constitution requires that permanent appointments in state civil service be based on merit as ascertained by competitive examination. The State Personnel Board (SPB), which has responsibility for enforcing the constitutional mandate for merit-based selection, has noticed an increasing number of illegal appointments occurring throughout state service. The purpose of this memorandum is to identify some of the common reasons for illegal appointments, provide guidance on measures that can be taken to avoid illegal appointments, and explain the process that should be followed when an illegal appointment is discovered. We hope that the information contained herein will provide state agencies¹ with a better understanding of the state's process to correct illegal appointments and assist state agencies in avoiding the types of errors that typically result in illegal appointments.

TYPES OF ILLEGAL APPOINTMENTS

Illegal appointments may occur for a variety of reasons including administrative errors, oversight, misinformation, or, in rare cases, attempts to circumvent the state's civil service system. A recent review of illegal appointments reported to SPB revealed the following most common reasons:

- Transfer of an individual based on inaccurate interpretation of the transfer requirements
- Appointment of an individual to an inappropriate salary range of a deep class
- Appointment of an individual from a non-reachable rank of the certification list
- Appointment of an individual with no civil service appointment eligibility
- Appointment of an individual who does not meet the minimum qualifications of the classification

Another common type of illegal appointment is a "short duration" appointment (approximately 60 days or less), that is intended to provide the employee with an advantage to which he/she would not otherwise be entitled. It should be noted

¹ "Agency" includes "department," "board," "office," "authority," "commission," and every other state governmental unit.

that the duration of the appointment does not, in itself, render the appointment invalid. As with other illegal appointments, short duration appointments will be investigated by SPB to determine whether the appointment was made and accepted in good faith.

PREVENTING ILLEGAL APPOINTMENTS

Appointment transactions within state service can be rather complex. Taking the following steps should greatly reduce the likelihood of illegal appointments occurring:

- Ensure that staff responsible for appointment transactions are provided with the necessary training on appointment eligibility issues (e.g., transfers, appropriate list clearance or certification process, minimum qualifications, and short duration appointments).
- Direct staff responsible for appointment transactions to take the time and steps necessary to verify appointment eligibility, including review of the applicable laws, regulations, and manual sections.
- Audit appointment transactions on a periodic basis to ensure compliance with eligibility requirements as set forth in the applicable laws and/or regulations.
- Consult with SPB Policy Consultation Unit when questions regarding civil service appointment eligibility arise.

ILLEGAL APPOINTMENT REVIEW PROCESS

When it is discovered that an employee, who has been appointed to a civil service classification, may not have eligibility for that appointment, SPB must be immediately notified, in writing, of the apparent illegal appointment. The agency's notification to SPB should include, at a minimum, the specific facts surrounding the appointment in question, a description of the circumstances which may have resulted in an illegal appointment, copies of relevant appointment documents, and any information and/or documentation which may demonstrate that the agency and employee acted in good faith when the appointment was offered and accepted. The attached listing (Attachment 1) identifies more specifically the type of information and documentation that should be submitted to SPB by state agencies when reporting a potential illegal appointment. SPB staff may contact the state agency if additional information is required.

At the time a state agency notifies SPB of the potential illegal appointment, the agency should also discuss with the employee the possibility that his/her appointment may be illegal and should provide the employee with the attached brochure (Attachment 2), which

provides information about the illegal appointment review process. A copy of the agency's letter notifying SPB of the potential illegal appointment should also be provided to the affected employee.

Upon receiving written notification of a possible illegal appointment from a state agency, SPB will acknowledge receipt of such notification and initiate an investigation. The investigation will involve a planned and systematic search for facts related to the appointment through a review of records and interviews with individuals associated with the appointment. Once the relevant facts have been gathered, they will be analyzed in light of the specific laws and regulations applicable to the appointment in question, and the intent of the appointing power and the employee. The investigation will also include consideration of appropriate remedial action in those cases in which the employee has accepted the appointment in good faith.

Once the investigation of the circumstances surrounding the reported illegal appointment has been completed, SPB will provide the state agency with its preliminary determination and send a copy of the determination directly to the employee's residence. This preliminary notice will document the reasons for SPB's determination and provide the employee and state agency with their right to provide additional information within 15 calendar days. It is the agency's responsibility to discuss SPB's preliminary findings with the affected employee and to answer any questions the employee may have regarding the pending action.

SPB will consider all information provided by the employee and/or the state agency during the 15-day period before issuing a final decision. The final decision rendered by SPB's executive officer will be sent to the state agency as well as to the employee. Once SPB has issued a final decision, the state agency and employee will have the opportunity to file a written appeal with the five-member State Personnel Board within 30 calendar days of receipt of the final determination.

It should be noted that a state agency does not have the legal authority to void an appointment. SPB has the sole authority to void or correct an illegal appointment that does not comply with the law and will do so only after it has gathered all the relevant facts, made a determination on the validity of the appointment, and afforded the employee with an opportunity to respond to the pending action. However, SPB may not void an appointment that is over one year old if it is determined that both the agency and the employee acted in "good faith." The standards for correcting and voiding appointments are set forth in California Code of Regulations Section 266. Through regulation, when SPB's executive officer determines that an appointment is unlawful, the executive officer shall determine whether the parties acted in good faith, pursuant to California Code of

Regulation Section 8, and shall take necessary corrective action up to and including voiding the appointment.

Illegal appointments can create a host of problems for the appointing authority and the employee. When an illegal appointment is voided by SPB, the employee loses any tenure in the position, as well as seniority credits, eligibility to take promotional examinations, and compensation at the voided appointment level. If "bad faith" is determined on the part of the appointing power, civil or criminal action may be initiated. Disciplinary action may also be pursued against any officer or employee in a position of authority who directs any officer or employee to take action in violation of the appointment laws. If bad faith is determined on the part of the employee, the employee may be required to reimburse all compensation resulting from the illegal appointment and may also be subject to disciplinary action.

Whenever an illegal appointment occurs, appropriate corrective action must be taken since allowing an illegal appointment to continue can provide the employee with an unfair and unearned appointment advantage over other employees whose appointments have been processed in compliance with the requirements of civil service law. Illegal appointments which are not corrected also create appointment inconsistencies that jeopardize the equitable administration of the civil service merit system. SPB will contact the state agency to discuss all options for correcting illegal appointments. A state agency may contact SPB to discuss any circumstances that may warrant immediate removal of the employee from an illegal appointment.

We hope the information in this memorandum will assist state agencies in preventing illegal appointments as well as resolving any illegal appointments that may occur. To provide more specific guidance on the processing of illegal appointments, SPB is currently revising the Personnel Management Policy and Procedures Manual Section 395 on illegal appointments. It is anticipated that this manual section will be released in the fall of 2002.

If you have any questions about the content of this memorandum or if you would like to discuss a pending illegal appointment, please contact Daphne Baldwin at (916) 653-1529 or TDD (916) 653-1498.

Mike Willihnganz
Chief, Policy Division

Attachments: 1-Listing of Information Needed to Review Illegal Appointments
2-Employee Brochure on Illegal Appointments

ATTACHMENT 1

Listing of Information Needed to Review Illegal Appointments

In order to review and investigate each appointment, the State Personnel Board needs various types of information in the form of a detailed memo with attachments from the department. The following are the most common types of documents or information needed to review a case. However, depending on the case, some of the items may not be applicable. We may also request other relevant documentation from the department:

- Social Security number
- Full name of employee and current home address
- Copy of the vacancy announcement
- Date of job interview(s)
- Date job offer was made
- Description of what was offered to the employee
- Date of the appointment
- Employee's civil service appointment eligibility
- The basis on which the hiring manager concluded the employee had eligibility and subsequently authorized the employee to start working
- Specific facts on how the illegal appointment occurred
- Chronology of events
- Specific civil service laws and rules that apply
- Information on whether the department and employee acted in good faith
- Description of any salary impact/compensation concerns with the appointment
- Calculation(s) showing the inappropriate transfer
- Description of how the department will prevent this type of error in the future
- Copy of the certification list used
- Copy of the State employment application and resume
- Copy of the alternate range determination worksheet
- Copy of the professional license
- Copy of the BA or BS Degree from a four year college
- Copy of the employee's signed Notice of Personnel Action (NOPA)
- Copy of the hiring package from the department's Personnel Office
- Copy of the organization chart(s)
- Copy of the employee history screen print from the PIMS system
- Department's street address and Personnel Officer's name and e-mail address

Introduction

This pamphlet is intended to provide the employee with some basic information about the illegal appointment review process in state service. Illegal appointments are made when the hiring of an individual does not comply with applicable civil service laws and regulations. Such appointments may result from administrative mistakes or misinformation, improperly clearing the employment list, or in rare cases, attempts to circumvent the state's civil service system.

Discovery of the Illegal Appointment

When the state agency determines that the employee's appointment may possibly be an illegal appointment, the employee should not be sent home, returned to their former position or encouraged to relinquish their current position. The state agency must immediately notify the State Personnel Board (SPB) in writing, of the apparent illegal appointment. Normally, the employee will continue to work in the position and continue to receive compensation until the employee is officially notified by SPB that the appointment will end. The SPB has the sole authority to void an illegal appointment. The voiding of an illegal appointment occurs only after all the facts are gathered and the employee is provided with an opportunity to respond.

Investigation of Facts

When notified of a possible illegal appointment, SPB conducts a review of the specific facts and relevant documents regarding the appointment, as

well as the applicable civil service laws, regulations, and policies. This information is reviewed to determine (1) the legality of the appointment and (2) whether the employee and/or state agency acted in good faith when the appointment was offered and/or accepted.

SPB's Preliminary Decision

After reviewing the facts, SPB will send a preliminary letter of determination to the employee as well as their state agency outlining the basis of the decision. The state agency will be available to discuss the preliminary letter with the employee and respond to any questions the employee may have regarding the pending action. The employee and the state agency will have 15 calendar days to submit additional information to SPB before a final decision is made. When additional information is presented, SPB will review the information and re-evaluate the pending action prior to rendering a final decision.

SPB's Final Decision

After the 15 calendar day response period has passed, SPB will send a final decision letter to the employee as well as their state agency. If SPB finds that the appointment is illegal, the appointment will be voided and SPB will include the ending date of the illegal appointment in the final letter. The state agency will be available to discuss the decision letter with the employee, respond to any questions, and inform the employee of their reinstatement eligibility. However, if the employee has no former state service that can be considered for reinstatement

purposes, the employee will be separated from state service.

If ending the illegal appointment will cause an extreme personal hardship on the employee, the employee should discuss this issue with their agency's Personnel Office.

Sometimes, it is found that the appointment in question is legal, and in those cases, SPB will send a letter outlining this determination to the employee and the state agency, and the employee continues working in the position.

Remedial Actions

When the investigation of an illegal appointment shows that an employee accepted the appointment in good faith, SPB will discuss remedial measures with the state agency to mitigate the negative effects that the appointment termination may have on the employee, (e.g., place the employee's name back on the employment list, conduct a deferred examination).

Appeal Rights

If the appointment is found to be illegal and will be voided, the employee and/or their state agency may appeal after receiving the final decision letter from SPB. Such appeals must be in writing, filed within 30 calendar days of receipt of the final decision to void the appointment, and addressed to the State Personnel Board, Appeals Division, P. O. Box 944201, Sacramento, CA 94244-2010.

Pay and Employee Benefits

In some cases, an employee whose appointment has been voided received a salary and employee benefits that he/she was not eligible to receive because of the illegal nature of the appointment. These benefits may include vacation, sick leave, health benefits, retirement benefits, salary step advancement, service towards vacation accrual rates, etc. Government Code Section 19275 allows employees, who acted in good faith when accepting the appointment, to retain the earned salary and benefits. However, if it is determined that the employee did not act in good faith when accepting the illegal appointment, the State shall be reimbursed for the compensation received.

of state service because the employee will be reinstated to another appointment the day immediately following the termination of the illegal appointment.

Questions

The Personnel Office of the state agency will assist the employee with any questions they may have regarding the appointment.



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Cancellation of Status Related Rights

When SPB voids an illegal appointment, this action cancels the status related aspects of the appointment that the employee normally would gain; this includes tenure in the appointment class, seniority credits, permissive reinstatement rights, eligibility to take promotional examinations, career credits, permanent or probationary status, service toward completion of the probationary period and any other status rights or eligibility stemming from the illegal appointment.

Employment History

Voided illegal appointments will appear on the employee's employment history as a separation transaction from state service. If the employee has former state service that can be considered for reinstatement purposes, termination of the illegal appointment will not break the continuity

Information About

The Illegal Appointment Review Process